Office of the State Appellate Defender

Illinois Criminal Law Digest

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APPEAL

§2-2(a)

People v. McCray, 2016 IL App (3d) 140554 (No. 3-14-0554, 9/27/16)

After defendant's bench trial, the trial court imposed a six-year sentence for unlawful possession of heroin and unlawful possession of cannabis with intent to deliver. The defendant filed a notice of appeal six days later.

Nine days after the notice of appeal was filed, the trial court filed a written judgment which added the requirement that defendant pay a drug assessment in the amount of $2000. The Appellate Court vacated the $2000 assessment as an improper modification of the sentence.

1. Once a notice of appeal is filed, the Appellate Court's jurisdiction attaches. At this point, the trial court may not modify the order or judgement or take any action which interferes with appellate review.

The entry of a written judgement order is a ministerial act that merely evidences the oral pronouncement of sentence, which is the judicial act comprising the judgment of the court. Thus, the trial court has jurisdiction to complete the ministerial act of filing a written judgment order even after notice of appeal has been filed.

2. However, the trial court lacked jurisdiction to modify the sentence after the notice of appeal had been filed. Because the $2000 drug assessment was not imposed during the trial court's oral pronouncement, the court could not assess that amount in the written judgement order. The court acknowledged that during the oral pronouncement the trial court ordered that defendant pay costs, but found that the drug assessment is a "fine" rather than a "cost."

(Defendant was represented by Assistant Defender Editha Rosario-Moore, Ottawa.)

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§2-5(b)

People v. Jackson, 2016 IL App (1st) 143025 (No. 1-14-3025, 9/30/16)

In deciding whether a defendant has established cause and prejudice for filing a successive post-conviction petition, the Illinois Supreme Court has held that leave to file a successive petition should be denied when it is clear from a review of the successive petition and documentation submitted by the defendant that the claims fail as a matter of law. **People v. Smith**, 2014 IL 115946. **Smith** left open the question of whether a court could consider the underlying record.

The Appellate Court held that until the Supreme Court resolves this issue, it would rely primarily on the petition and its supporting documentation, and would take judicial

notice of its prior opinions and orders, in deciding whether a defendant has established cause and prejudice.

(Defendant was represented by Assistant Defenders Sharon Nissim, Chicago, and Yasemin Eken, Elgin.)

§2-6(c)

People v. Montalvo, 2016 IL App (2d) 140905 (No. 2-14-0905, 9/23/16)

An appeal is moot when events which occurred after the appeal was filed make it impossible for the reviewing court to provide effective relief. Where a defendant has been released from prison but remains on mandatory supervised release, a reduction in his prison sentence will affect how long he can be reincarcerated for a violation of MSR. Accordingly, a challenge to the length of a prison term is not moot if it is brought before the defendant completes his MSR term.

(Defendant was represented by Deputy Defender Tom Lilien, Elgin.)

§2-6(e)

People v. Stafford, 2016 IL App (4th) 140309 (No. 4-14-0309, 9/1/16)

Noting a conflict in Appellate Court authority, the Fourth District Appellate Court held that **People v. Castleberry**, 2015 IL 116916did not create a new rule and therefore applies retroactively. Because **Castleberry** abolished the void sentence rule, the previous rule is reinstated. Thus, a sentence can be challenged as void only if the court lacked personal or subject matter jurisdiction.

(Defendant was represented by Assistant Defender James Williams, Springfield.)

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ARMED VIOLENCE

§3-3

People v. Cherry, 2016 IL 118728 (No. 118728, 9/22/16)

A defendant commits armed violence when he personally discharges a firearm while committing any felony except a felony that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced

version of the offense, or a mandatory sentencing factor that increases the sentencing range.720 ILCS 5/33A-2(b).

Defendant was convicted of armed violence predicated on aggravated battery causing great bodily harm. 720 ILCS 12-4(a). Defendant argued that aggravated battery could not serve as the predicate offense for armed violence since aggravated battery with a firearm is an enhanced version of aggravated battery and it makes the possession or use of a dangerous weapon the element which enhances the offense. 720 ILCS 5/12-4.2.

The court rejected defendant's argument. Possession or use of a weapon is not an element of the base offense, aggravated battery. Aggravated battery with a firearm is not an enhanced version of aggravated battery; it is an enhanced version of battery. Both forms of aggravated battery require proof of battery plus an additional aggravating factor. Aggravated battery with a firearm and aggravated battery causing great bodily harm are separate aggravated versions of battery. Aggravated battery causing great bodily harm may thus serve as the predicate offense for armed violence.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

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COLLATERAL REMEDIES

§9-1(a)

People v. Shief, 2016 IL App (1st) 141022 (No. 1-14-1022, 9/8/16)

1. 725 ILCS 5/122-1(b) states that the clerk "shall" docket a post-conviction petition for consideration by the court and "bring the same promptly to the attention of the court." Here, the clerk failed to docket defendant's post-conviction petition and for nine months failed to respond to defendant's inquiries about the status of the petition. Defendant eventually refiled his petition, which was summarily dismissed.

On appeal, defendant argued that the summary dismissal should be reversed and the cause remanded for second-stage proceedings because the clerk failed to promptly docket his petition. The court rejected this argument, finding that the requirement that the petition be promptly docketed is "directory" rather than "mandatory."

A statute which issues a procedural command to a government official is presumed to be directory, but that presumption is overcome if: (1) there is negative language prohibiting further action in the case of noncompliance, or (2) when the right the provision is designed to protect would generally be injured under a directory reading. There is no language in the Post-Conviction Hearing Act prohibiting further action or specifying a consequence if the clerk does not docket a post-conviction petition in a timely manner, and certainly no suggestion that the petition must be advanced to second-stage post-conviction proceedings.

The court contrasted the statutory language concerning the clerk's duty to docket the petition with 725 ILCS 5/122-2.1, which requires the trial court to conduct a first-stage review of a petition within 90 days and provides that the petition is advanced to second-stage proceedings if the 90-day limit is violated. Section 122-2.1 prescribes a specific consequence if the deadline for trial court action is not met, while §122-1(b) prescribes no such consequence for the clerk's failure to promptly docket a post-conviction petition.

Similarly, the second exception to the presumption that statutes directing government officials are directory - whether "the right the provision is designed to protect would generally be injured under a directory reading" - is inapplicable. To meet this exception, it is not enough to show that in a particular case a party's rights may be prejudiced. Instead, the party must show that prejudice would *generally* occur. The court noted that petitioners can refile their petitions and obtain a first-stage hearing, as defendant did here. Thus, the likelihood of prejudice is not so great that the prompt-docketing requirement must be deemed mandatory under the second exception.

The court noted that even if the refiled petition was untimely, there would be no effect on first-stage review because in first-stage proceedings, a petition may not be dismissed on timeliness grounds. Furthermore, if the petition survived to the second stage, the petitioner could raise the clerk's failure to docket the petition as a reason to excuse the untimely filing. Thus, in most cases delay by the clerk in docketing a petition will have no effect on the trial court's eventual consideration of the merits of the petition.

2. The court acknowledged that even where a provision is directory, the defendant may be entitled to relief if he can demonstrate he was prejudiced by a violation of the provision. Here, however, defendant is not claiming that the delay prejudiced his ability to properly prepare and present his case. Instead, he is arguing only that the unreasonable delay in the consideration of his petition, in and of itself, is sufficiently prejudicial to warrant advancement of his case to second-stage proceedings. The court concluded:

> As sympathetic as we are with defendant's claim, and as much as we join him in condemning the unacceptable delay, we do not find this one-year delay sufficient to warrant a vacatur of the dismissal of his post-conviction petition and automatic advancement to second-stage proceedings. In the end, defendant refiled his petition, presented it, and received a fair hearing on the merits; he does not contend otherwise.

The summary dismissal of the post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

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§§9-1(i)(2), 9-1(o)(1)

People v. Jackson, 2016 IL App (1st) 143025 (No. 1-14-3025, 9/30/16)

In deciding whether a defendant has established cause and prejudice for filing a successive post-conviction petition, the Illinois Supreme Court has held that leave to file a successive petition should be denied when it is clear from a review of the successive petition and documentation submitted by the defendant that the claims fail as a matter of law. **People v. Smith**, 2014 IL 115946. **Smith** left open the question of whether a court could consider the underlying record.

The Appellate Court held that until the Supreme Court resolves this issue, it would rely primarily on the petition and its supporting documentation, and would take judicial notice of its prior opinions and orders, in deciding whether a defendant has established cause and prejudice.

(Defendant was represented by Assistant Defenders Sharon Nissim, Chicago, and Yasemin Eken, Elgin.)

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§9-5(d)

People v. Cashaw, 2016 IL App (4th) 140759 (No. 4-14-0759, 9/30/16)

Under **Teague v. Lane**, 489 U.S. 288 (1989), new rules of criminal procedure generally do not apply retroactively to final convictions and hence cannot be used in a postconviction attack on a conviction that became final prior to the announcement of the new rule. Illinois has adopted the **Teague** rule to govern retroactivity in State collateral proceedings.

Teague's purpose is to protect the State's interest in final judgments. **Teague** thus only applies when a defendant seeks to overturn his conviction by retroactively applying a new rule that is favorable to him. Under **Teague**, the State, but not the defendant, may object to the application of a new rule to a case on collateral review.

The court held that **People v. Castleberry**, 2015 IL 116916, applied retroactively to defendant's postconviction case for two reasons. First, **Castleberry** did not announce a new rule. Instead, it merely abolished the void sentence rule and thereby reinstated the rule in effect before the void sentence rule was created. Second, in this case defendant sought to prevent the application of a new rule to a collateral proceedings not to preserve the finality of a judgment, but to disturb its finality. A defendant cannot use **Teague** to argue that a new rule should not apply when the defendant is seeking to overturn a judgment.

The court thus concluded that although defendant's fine would have been considered void prior to **Castleberry**, once the rule in **Castleberry** applied to his case,

the fine was no longer void and could not be challenged in a successive collateral proceeding.

(Defendant was represented by Assistant Defender Erica Nichols-Cook, Springfield.)

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CONFESSIONS

§10-10

People v. Lucious, 2016 IL App (1st) 141127 (No. 1-14-1127, 9/8/16)

The State charged defendant and his co-defendant with aggravated robbery which required proof that defendant or co-defendant indicated verbally or by their actions that they were armed. (720 ILCS 5/18-1(b)) At a joint bench trial, the State introduced evidence that co-defendant admitted to police that he told the victim "Don't make him [defendant] shoot you." In finding both defendants guilty, the trial court cited co-defendant's statement as evidence supporting the aggravated robbery charge. Defendant's counsel did not object to the court's reliance on this evidence.

The confrontation clause is violated when a trial court presiding over a joint bench trial expressly relies on a co-defendant's statement as evidence of defendant's guilt. The Appellate Court held that counsel was ineffective for failing to object to the trial court's consideration of the co-defendant's out-of-court statement as evidence against defendant. The court acknowledged that at a joint bench trial the trial court is expected to be able to consider the evidence against each defendant separately. But here the trial court expressly considered co-defendant's statement as evidence of defendant's guilt. Once that occurred, trial counsel had a duty to object to the trial court's improper use of the evidence. Counsel's failure to do so constituted ineffective assistance.

The court vacated defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

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COUNSEL

§13-1(c)

People v. Buckhanan, 2016 IL App (1st) 131097 (No. 1-13-1097, 9/27/16)

The trial court erred by disqualifying defendant's counsel of choice on the ground that counsel's father represented defendant's girlfriend, who was a potential State witness.

1. The Sixth Amendment right to the assistance of counsel includes a presumption in favor of defendant's counsel of choice. This presumption may be overcome if the State proves that there is an actual conflict of interest or a serious potential for such a conflict.

In Illinois, a two-part test applies where the prosecution challenges defendant's counsel of choice. First, the trial court must determine whether defense counsel has a specific professional obligation that actually or potentially conflicts with defendant's interests. If the answer to this question is yes, the trial court must determine whether the interests threatened by that conflict are of sufficient weight to overcome the presumption in favor of defendant's counsel of choice.

Courts must consider the likelihood that a purported conflict will actually occur, because a conflict that has little likelihood of occurring is not a legitimate basis to disqualify counsel of choice. The courts must also consider defendant's interest in having the undivided loyalty of counsel, the State's right to a fair trial at which defense counsel is not permitted to use confidential information to attack a State's witness, any appearance of impropriety that would result should the jury learn of the conflict of interest, and the probability that continued representation by counsel of choice will provide grounds to overturn a conviction on appeal.

The court should also consider whether there are alternatives to disqualification of counsel that would remove the conflict while protecting the right to counsel of choice. The trial court's decision to disqualify counsel is reviewed for abuse of discretion.

2. Rule 1.10(a) of the Illinois Rules of Professional Conduct states that lawyers who are "associated in a firm" may not represent a client when any member of the firm would be prohibited from doing so. Whether two or more lawyers constitute a "firm" depends on the facts of each case.

Practitioners are not part of a firm merely because they share office space and occasionally consult or assist each other, but may be regarded as a firm if they present themselves to the public in a way that suggests that they are associated in a firm. Any formal agreement between lawyers is relevant in determining whether they constitute a firm, as is the fact that they have mutual access to information concerning their clients.

The court noted that although the father and son were not formally associated in a law firm, they might arguably constitute a firm given the closeness of their relationship. The father and son shared office space and acted as co-counsel in various criminal matters, and the father covered for the son in a number of court appearances in this case. The court concluded that even if their relationship constituted a "firm," however, the interests threatened by the potential for conflict were not sufficient to overcome the constitutional presumption in favor of defendant's counsel of choice.

3. The State argued that it was necessary to disqualify the son because he and the father could exchange confidential information and give the defense an unfair advantage at trial. The State also argued that there was an inconsistency between the witness's statement at the police station and her grand jury testimony, and that because

the father observed the statement he might be called to testify if the witness recanted the out-of-court statement. The State contended that an appearance of impropriety would be created if the father testified and the jury learned that he was representing the witness while the son was representing defendant.

The court rejected the State's arguments. First, there was nothing in the record to indicate that the two attorneys had shared information. Second, at a pretrial hearing the father indicated that he had no recollection of the witness making the statement in question. Third, because the court found that the statement and grand jury testimony did not actually contradict each other, the "entire basis of the State's argument is meritless."

Fourth, a mere appearance of impropriety is a "slender reed" on which to disqualify counsel of choice. Finally, any appearance of impropriety could easily have been avoided if the parties stipulated to the father's testimony in a way that avoided mentioning his name or relationship to the son.

4. The court also questioned whether the State acted in good faith, noting that the State first learned more than a year before trial that the father was representing the witness, but filed their motion to disqualify counsel less than one month before the trial was scheduled to begin. Furthermore, after counsel was disqualified and defendant went to trial with substitute counsel, the State failed to ask the witness a single question about the alleged inconsistency between her statement and grand jury testimony. The State also had several other witnesses who could have testified to the same point, removing any need to call the father at all.

5. Defendant waived any conflict in open court, and the State did not argue that the waiver was ineffective. Thus, defendant would not be able to appeal any conviction on the grounds that trial counsel was constitutionally ineffective due to a conflict of interest.

Because the trial court abused its discretion by granting the State's motion to disqualify defendant's counsel of choice, the conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

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§13-2

People v. Washington, 2016 IL App (1st) 131198 (No. 1-13-1198, 9/20/16)

1. Supreme Court Rule 401(a) provides that before accepting a waiver of the right to counsel, the trial court must determine that the defendant understands the nature of the charge, the sentencing range, the right to counsel, and the right to have counsel appointed due to indigency. While strict compliance with Rule 401(a) is not required,

there must at least be substantial compliance. In addition, the record must show a knowing and voluntary waiver.

Once a defendant makes a valid waiver of counsel, that waiver remains in effect throughout the proceedings, including post-trial stages, unless: (1) defendant again requests counsel, or (2) other circumstances suggest that the waiver is limited to a particular stage of the proceedings.

In addition, where there are lengthy delays between the trial stages or the defendant later requests counsel, the trial court must readmonish the defendant under Supreme Court Rule 401(a) before again accepting a waiver. Thus, where defendant waives counsel, proceeds *pro se*, requests counsel for a distinct stage of the proceedings, receives counsel at that point, and then again decides to waive counsel, new admonishments must be given.

2. Defendant represented himself at trial, but at the beginning of the sentencing hearing requested an attorney to represent him on the motion for new trial. The trial court appointed the public defender and ordered a continuance.

At subsequent proceedings, defendant vacillated about whether he wanted to have an attorney appointed or wished to proceed *pro se*. Several additional continuances were ordered. Eventually the trial court stated that defendant had to decide whether he wanted to be represented by counsel or represent himself. Defendant responded, "For the purposes of the record, **Edwards v. Indiana** - I am the architect of the defense." The trial court then dismissed appointed counsel and set a date for a hearing on defendant's *pro se* post-trial motions and sentencing.

The court concluded that the trial court erred by failing to give new Rule 401(a) admonishments before accepting defendant's waiver of counsel. The court concluded that the original waiver did not continue in light of defendant's request for counsel on the post-trial motion.

The court concluded that by asking defendant if he wanted the assistance of counsel at the sentencing stage, the trial court "at least implicitly" informed defendant of the right to counsel and that counsel would be appointed if defendant was indigent. Thus, the third admonishment required by Rule 401(a) was satisfied. However, the trial court did not substantially comply with Rule 401(a) where it failed to state either the nature of the charges or the minimum and maximum penalties.

The court acknowledged that defendant was fully informed of his right to counsel and vacillated numerous times between wanting counsel and wanting to represent himself. However, Rule 401(a) admonishments must be provided at the time the trial court learns that defendant wants to waive counsel and proceed *pro se*. Admonishments given at an earlier time do not suffice where counsel has entered the case at defendant's request but a subsequent request to proceed *pro se* is made.

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Because the trial court failed to substantially comply with Rule 401(a) where defendant accepted the assistance of counsel after trial but again elected to waive counsel, the cause was remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Sharifa Rahmany, Chicago.)

§13-4(a)(1)
People v. Cherry, 2016 IL 118728 (No. 118728, 9/22/16)

In **United States v. Cronic**, 466 U.S. 648 (1984), the Supreme Court held that the usual prejudice prong of **Strickland** does not apply and prejudice may be presumed where (1) defendant is denied counsel at a critical stage; (2) counsel entirely fails to subject the State's case to meaningful adversarial testing; and (3) counsel represents a client in situations where no lawyer could provide effective representation. The second exception only applies where counsel's effectiveness falls to such a low level that it is not merely incompetence, but no representation at all.

Defendant argued that the representation of his counsel at a **Krankel** hearing was so deficient that prejudice should be presumed under the second **Cronic** exception. The court rejected defendant's argument. At the **Krankel** hearing, counsel orally argued defendant's *pro se* claims concerning his trial counsel's ineffectiveness. Although it was possible counsel could have done more, such as introducing evidence in support of defendant's claims, the failure to do so does not rise to the level of no representation at all. Counsel's failure, if any, would have been nothing more than poor representation under **Strickland**. And since defendant made no showing of prejudice, he could not prevail under the second prong of **Strickland**.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

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§13-4(b)(2)
People v. Valdez, 2016 IL 119860 (No. 119860, 9/22/16)

Under **Padilla v. Kentucky**, 559 U.S. 356 (2010), defense counsel has a duty to correctly advise a defendant about the immigration consequences of a guilty plea before defendant enters the plea. In **Padilla**, even a cursory check of the relevant statute would have disclosed that the conviction would make the defendant mandatorily deportable. However, defense counsel told the defendant that he need not worry about the effect of the plea on his immigration status.

The **Padilla** court stated that where the law is not straightforward, defense counsel need only advise a non-citizen defendant that a guilty plea may carry a risk of adverse immigration consequences.

2. Here, defense counsel failed to inform a guilty plea defendant that the plea might carry any consequences on his immigration status. The court stated that the effect of the conviction on defendant's immigration status was unclear, because depending on the circumstances a burglary conviction may or may not make deportation presumptively mandatory. Under these circumstances defense counsel was required only to advise defendant that his guilty plea might have immigration consequences.

3. Thus, defense counsel's failure to provide any advice about defendant's immigration status was objectively unreasonable and satisfied the first component of **Strickland**. However, the court concluded that the defendant could not show prejudice where the trial court complied with 725 ILCS 5/113-8 by admonishing defendant that the conviction "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization." Because defense counsel was merely required to advise defendant of a possibility of immigration consequences, the trial court's admonishments to the same effect cured any prejudice resulting from defense counsel's omission.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

§13-4(b)(4)

People v. Goods, 2016 IL App (1st) 140511 (No. 1-14-0511, 9/12/16)

A defendant is entitled to an instruction of self-defense if there is some evidence on each of the following elements: (1) force was threatened against defendant; (2) defendant was not the aggressor; (3) danger of harm was imminent; (4) the threatened force was unlawful; (5) defendant actually and subjectively believed a danger existed which required the use of force; and (6) defendant's beliefs were objectively reasonable. When evidence supports a self-defense instruction, a second-degree murder instruction must be given as a mandatory counterpart.

The court held that defense counsel was ineffective for not presenting a claim of self-defense. The evidence showed that prior to the night of the shooting, the victim had acted in a menacing fashion towards defendant and had displayed a gun. In response to this menacing behavior defendant armed himself with a gun. On the night of the shooting, the victim drove defendant to an apartment complex in order to rob two acquaintances of defendant's, including co-defendant. They both got out of the car and defendant saw the victim fumbling in his waist. Defendant feared that the victim might be getting ready to shoot him.

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The two men walked through the parking lot when co-defendant, an acquaintance of defendant's who also knew about the victim's threatening behavior, came out of nowhere, knocked the victim to the ground and then shot him. The co-defendant's actions frightened defendant, who also fell to the ground. When defendant got up, he shot the victim several times as he lay on the ground. Co-defendant took the victim's gun and shot him again. Defendant was convicted of first-degree murder.

The court held that the evidence showed defendant believed he was in danger and that the victim threatened defendant with force when he showed defendant his gun and acted in a menacing manner. On the night of the shooting, defendant saw the victim fumbling in his waistband and knew that the victim intended to commit a robbery. The record thus provided slight evidence warranting a jury instruction on self-defense. And since this defense was consistent with the defense actually presented, counsel's failure to raise self-defense amounted to deficient representation.

The failure to raise this defense was also prejudicial. In making this finding, the court noted that co-defendant was convicted of second degree murder. Even if defendant's belief in self-defense had been unreasonable the jury could have found him guilty of second degree murder.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

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§§13-4(b)(4), 13-4(b)(6)(c)

People v. Lucious, 2016 IL App (1st) 141127 (No. 1-14-1127, 9/8/16)

In deciding if counsel has been ineffective, courts must be highly deferential to counsel's strategic choices, but will still find counsel's performance deficient where a strategic decision is so unreasonable that no effective counsel facing similar circumstances would pursue such a strategy.

The State charged defendant and his co-defendant with aggravated robbery which required proof that defendant or co-defendant indicated verbally or by their actions that they were armed. (720 ILCS 5/18-1(b)) At a joint bench trial, the State introduced evidence that co-defendant admitted to police that he told the victim "Don't make him [defendant] shoot you." In finding both defendants guilty, the trial court cited co-defendant's statement as evidence supporting the aggravated robbery charge. Defendant's counsel did not object to the court's reliance on this evidence.

The Appellate Court held that counsel was ineffective for failing to object to the trial court's consideration of the co-defendant's out-of-court statement as evidence against defendant. The confrontation clause is violated when a trial court presiding over a joint bench trial expressly relies on a co-defendant's statement as evidence of defendant's

guilt. The Appellate Court acknowledged that at a joint bench trial the trial court is expected to be able to consider the evidence against each defendant separately. But here the trial court expressly considered co-defendant's statement as evidence of defendant's guilt. Once that occurred, trial counsel had a duty to object to the trial court's improper use of the evidence. Counsel's failure to do so constituted deficient performance under the first prong of **Strickland**.

The court specifically rejected the State's argument that counsel's failure to object was the product of strategy. The improper statement provided an essential element of aggravated robbery. No reasonable attorney would fail to see that. And objecting to the evidence would have directly aligned with counsel's strategy of seeking a conviction on the lesser offense of robbery.

The court also found that counsel's error was prejudicial under the second prong of **Strickland** since the improper evidence established an essential element of aggravated robbery. Had counsel objected, there was a reasonable probability that defendant would have been acquitted of that offense.

The court vacated defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

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§13-4(b)(11)

People v. Nesbit, 2016 IL App (3d) 140591 (Nos. 3-14-0591 & 3-14-0695, 9/8/16)

A defendant is entitled to credit against his sentence for each day he spends in pretrial custody. But a defendant who is out on bond on one charge and is subsequently arrested and returned to custody on another charge is not entitled to credit on the first charge until his bond is withdrawn or revoked. Once a defendant withdraws or surrenders his bond, he is considered in custody on both charges and earns credit against each charge.

A month after he was charged in the present case, defendant posted bond and was released from custody. The Department of Corrections immediately took defendant into custody for an earlier conviction. When defendant appeared in court on the present charge, his attorney informed the court that defendant was on bond in this case and in DOC custody on another case.

Following his conviction, defendant filed a post-conviction petition alleging that his counsel had provided ineffective assistance of counsel for failing to surrender his bond. In an affidavit attached to the petition, defendant stated that his counsel never informed him that he could surrender his bond and receive sentencing credit. He further stated that if his counsel had so informed him, he would have surrendered his bond.

The Appellate Court held that defendant's post-conviction claim made a substantial showing of ineffective assistance warranting a third-stage evidentiary hearing. The failure of counsel to notify defendant of his option to surrender bond and receive credit was objectively unreasonable and created prejudice by depriving defendant of sentencing credit.

The case was remanded for a third-stage evidentiary hearing.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

DISORDERLY, ESCAPE, RESISTING AND OBSTRUCTING OFFENSES

§16-1(d)

People v. Kent, 2016 IL App (2d) 140340 (No. 2-14-0340, 9/23/16)

A defendant commits mob action when he and at least one other person act together to use force or violence that disturbs the public peace. 720 ILCS 5/25-1(a)(1). To sustain a conviction, the evidence must show that the defendant was part of a group engaged in physical aggression reasonably capable of inspiring fear of harm.

Defendant and his girlfriend, a woman named Wilson, drove to the home of an acquaintance, a man named Jackson. When they arrived, Wilson began arguing with Jackson in the front yard. Defendant also argued with Jackson. Wilson turned away to go inside. When Jackson also turned to go inside, defendant hit him from behind. Jackson and defendant began fighting. After a few minutes, a third man broke up the fight.

The court held that the State failed to prove that defendant and Wilson were acting together when he hit Jackson and began fighting with him. There was no evidence Wilson threatened or touched Jackson at any time. And there was no evidence of any communication between defendant and Wilson that would show that they were acting together. There was thus no evidence that defendant was part of a group engaged in physical aggression.

The court reversed defendant's conviction for mob action.

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

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DOUBLE JEOPARDY

§§17-2, 17-3

People v. Palen, 2016 IL App (4th) 140228 (No. 4-14-0228, 9/30/16)

1. For purposes of the double jeopardy clause, jeopardy attaches when the accused has been arraigned and the jury impaneled and sworn. Once jeopardy has attached, the defendant has a right to have his fate decided by the particular jury which has been selected. This right may be denied only where the ends of justice would be defeated by continuing the trial.

The parties selected eight jurors on the first day of proceedings. The trial court administered the oath to these eight jurors and continued the cause until the next day. The parties expected to select four jurors and two alternates the next day, but during the night the father of one of the prosecutors died.

When the proceedings resumed, the trial court ordered a mistrial *sua sponte* after noting that the remaining prosecutor had never tried a felony case. Defendant was subsequently tried and convicted of attempt residential burglary and possession of burglary tools.

On appeal, defendant claimed that he was placed in jeopardy when the trial court swore eight jurors before recessing overnight. The Appellate Court rejected this argument, citing **LaFave**, 6 Criminal Procedure §25.1(d) (4th ed. 2015), for the principle that jeopardy attaches when the "entire" jury has been selected and sworn. The court concluded that because the trial judge announced an intention to select additional jurors on the following morning, jury selection had not been completed. Where only eight jurors had been sworn, the jury had not been "empaneled and sworn."

The court also noted that it would be a better practice for the trial court to wait until the entire jury is selected before swearing any jurors. Furthermore, in this case the trial court should have consulted the prosecutor to determine whether he was able to try the case or whether there could be further assistance from the State's Attorney's office, and inquired of the parties about the possibility of suspending the proceedings until the original prosecutor was available.

2. In dissent, Justice Steigmann stated that the **LaFave** treatise misstates United States Supreme Court case law by holding that jeopardy attaches only when the entire jury is sworn. Justice Steigmann would have held that right to have the case tried by the jurors who have been selected applied once any jurors are sworn.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

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EVIDENCE

§§19-10(a), 19-24(a), 19-24(b)(8), 19-24(c)

People v. Jacobs, 2016 IL App (1st) 133881 (No. 1-13-3881, 9/29/16)

Defendant was charged with possession of a stolen motor vehicle. At trial, the son of the owners of the vehicle testified that jewelry was taken from his parents' house at the same time the vehicle was stolen. The son testified that when he went to a pawn shop to see if he could find his mother's jewelry, he saw defendant drive the stolen car away from the store.

Before trial, the trial court granted a motion in limine excluding the evidence that jewelry had been taken from the home. However, the trial court overruled defense objections when the prosecutor mentioned the jewelry in opening argument. The trial judge then stated that the evidence was admissible to show that the car had been stolen.

The Appellate Court held that the evidence was improperly admitted as other crimes evidence, and was especially prejudicial where the trial court refused to allow defendant to present evidence that another person had been arrested for burglarizing the house.

1. Other-crimes evidence is inadmissible if used merely to show defendant's propensity to commit crimes. Evidence of other crimes may be admitted for other purposes, such as proving motive, opportunity, intent, preparation, planning, knowledge, identity, or absence of mistake or accident. In addition, under the continuing-narrative exception, defendant's other bad acts are admissible when those acts are part of a continuing narrative which concerns the circumstances of the entire transaction and are not separate and distinct crimes. The continuing-narrative exception will not apply, even where crimes occur in close proximity, if the crimes are distinct and undertaken for different reasons at different places and times.

The Appellate Court concluded that even if the continuing narrative exception applied, the probative value of the evidence that jewelry was stolen was substantially outweighed by the prejudicial effect. The court noted that the State could have established that the son saw defendant driving the stolen vehicle without stating that the car had been at a pawn shop and creating an inference that defendant had been involved with the burglary and theft of the jewelry. The evidence was prejudicial to defendant not only because it created an unmistakable inference that he was involved in a crime for which he was not on trial, but also because it directly impacted his defense that he had been allowed to drive the car by an acquaintance and did not know it had been stolen.

2. In addition, defendant was improperly precluded from introducing evidence that another person had been arrested for the burglary of the home. First, the trial judge erred by finding that the excluded evidence was hearsay where it referred only to the fact of an arrest, and not to any out-of-court assertion. Second, the concerns underlying the admission of other-crimes evidence are not present where the uncharged crime was

committed by someone other than the defendant. Exclusion of the evidence here was critical because the fact that another person was arrested for the burglary could have dispelled much of the prejudice created by the admission of evidence of the burglary and theft of the jewelry.

3. The evidentiary errors were not harmless. The improperly admitted evidence created an inference that defendant had committed a burglary of the home and therefore likely stole the car which he was charged with possessing, directly contradicting his claim that he did not know the vehicle was stolen. In addition, the trial court failed to give a limiting instruction concerning the other crimes evidence. Finally, the risk of prejudice was increased because defendant was impeached with a prior conviction for residential burglary, the offense to which he was improperly linked by the other crimes evidence.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

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§19-10(b)

People v. Hood, 2016 IL 118581 (No. 118581, 9/22/16)

1. A criminal defendant has a constitutional right to physically face persons who testify against him and to conduct cross-examination. Under **Crawford v. Washington**, 541 U.S. 36 (2004), where the State seeks to admit "testimonial" hearsay, it must establish both that the declarant is unavailable to testify at trial and that defendant had a prior opportunity for cross-examination. Under **Crawford**, depositions are testimonial hearsay.

2. Here, the State sought to admit the deposition of the complainant. The court found that the State demonstrated that the complainant was unavailable to testify at trial and that defendant had a prior opportunity for cross-examination. The complainant's attending physician testified that at the time of trial, the complainant was living in a nursing home and was unable to care for himself. In addition, the testimony established that the complainant was suffering from severe dementia, had no awareness of his environment, and was unable to communicate in any meaningful way.

Furthermore, defendant had the opportunity for cross-examination although he was not present at the deposition. The court noted that defendant was not barred or prevented from attending the deposition; in fact, the trial court's order for the deposition directed the Cook County Sheriff to transport defendant to the deposition "over the objection of the defendant." This paragraph was then crossed out by hand. At trial, defense counsel confirmed that he had waived defendant's presence at the deposition. Under these circumstances, defendant was fully aware that the deposition had been ordered and that he had the right to attend.

In addition, two assistant public defenders appeared on defendant's behalf at the deposition and conducted cross-examined.

Because both the unavailability of the complainant and a prior opportunity for cross-examination were shown, admission of the deposition did not violate **Crawford**.

3. Similarly, admission of the deposition did not violate defendant's due process right to be present. The due process right to be present is a "lesser right" that is violated only if the defendant's absence results in an unfair proceeding or the loss of an underlying substantial right. The court found that because defendant's confrontation rights were not violated, there could be no violation of the secondary due process right to be present.

4. Supreme Court Rule 414(e) provides that defendant and defense counsel have the right to confront and cross-examine any witness whose deposition is taken, but that defendant and defense counsel "may waive such right in writing." The court rejected the argument that the trial court violated Rule 414(e) by admitting a deposition that had been obtained without defendant's written waiver. The court found that the written waiver requirement was not constitutionally mandated, but was merely a procedural rule to ensure the defendant was given notice of the deposition and an opportunity to appear. Where it was clear that defendant knew of the deposition and that he could attend if he wanted, the absence of a written waiver did not cause prejudice.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

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HOMICIDE

§§26-1, 26-2, 26-4(a)

People v. O'Neal, 2016 IL App (1st) 132284 (No. 1-13-2284, 9/29/16)

1. There are three types of first-degree murder: (1) intentional murder (where defendant intends to kill or do great bodily harm or knows that his acts will cause death); (2) strong-probability murder (where defendant knows that his acts create a strong probability of death or great bodily harm); and (3) felony murder (where defendant commits or attempts to commit a forcible felony and a death occurs during the commission of that felony). Second degree murder occurs when the defendant commits either intentional, knowing, or strong-probability first-degree murder and the defendant either acted under a sudden and intense passion resulting from serious provocation by the victim or in an unreasonable belief that his actions were justified by self-defense.

Thus, a mitigating factor such as imperfect self-defense will reduce a charge of first-degree intentional or strong probability murder to second degree murder. Because second degree murder cannot be the predicate felony for felony murder, however, an

unreasonable belief in self defense will not reduce felony murder to a lesser offense. The court noted that felony murder is not concerned with the defendant's state of mind in committing acts which lead to a death, but is intended to deter the commission of the predicate forcible felony by holding the wrongdoer liable for any foreseeable death that results from the commission of that felony.

2. Under Illinois Supreme Court case law, a conviction for felony murder will be upheld only if the act resulting in death was not inherent in the murder itself. **People v. Morgan**, 197 Ill.2d 404, 758 N.E.2d 813 (2001). Because every fatal shooting involves conduct which constitutes aggravated discharge of a firearm, the State could charge every fatal shooting as felony murder predicated on aggravated discharge of a firearm and obtain a first degree murder conviction without proving an intentional or knowing murder. In other words, by charging every fatal shooting as felony murder predicated on aggravated discharge of a firearm, the State could nullify the second degree murder statute.

A conviction for felony murder will stand, however, where the predicate felony was based on an act which is not the same act on which the murder charge is based. For example, felony murder could be predicated on mob action where the defendant committed several acts toward the decedent and the mob action charge was based on acts that were distinct from the acts which caused death. **People v. Davison**, 236 Ill.2d 232, 923 N.E.2d 781 (2010).

3. Defendant was charged with intentional first-degree murder, strong-probability first degree murder, felony murder predicated on aggravated discharge of a firearm, and aggravated discharge of a firearm. All of the offenses involved shooting at a van which drove slowly past a party at which defendant was acting as security. A bystander seated in a car that was parked across the street was killed by one of the shots.

Defendant raised a defense of unreasonable belief in self-defense. The jury convicted of second-degree murder on the counts alleging intentional and strong probability murder, but convicted defendant of felony murder.

The court concluded that the act which constituted the predicate felony - shooting at the van - was inherent in the offense of felony murder. Firing at the van was the only act which defendant was alleged to have performed, and the State did not attempt to differentiate between the various shots as the cause of the bystander's death. In addition, the State conceded that every shot defendant fired was intended for the occupants of the van. Under these circumstances, permitting a conviction for felony murder would nullify the second degree murder statute, particularly where the jury convicted defendant of second degree murder on the two counts on which a claim of imperfect self-defense could be raised.

4. In addition, under Illinois Supreme Court precedent, a conviction for felony murder will be upheld only if defendant had independent felonious purposes in committing the predicate felony and the murder. The court concluded that this

requirement was not satisfied because defendant acted with only one purpose - firing at the van.

In the course of its holding, the court noted that under the doctrine of transferred intent, if a defendant shoots at one person with intent to kill but inadvertently kills a bystander, he may be convicted of murder for the death of the bystander. The court concluded that under the same doctrine, if the defendant acts in self-defense in shooting at an intended target, he also acts in self-defense concerning the unintentional shooting of the bystander.

The first degree murder conviction for felony murder was reversed and the cause remanded for sentencing on second degree murder.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

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§§26-4(a), 26-7(a)

People v. Goods, 2016 IL App (1st) 140511 (No. 1-14-0511, 9/12/16)

A defendant is entitled to an instruction of self-defense if there is some evidence on each of the following elements: (1) force was threatened against defendant; (2) defendant was not the aggressor; (3) danger of harm was imminent; (4) the threatened force was unlawful; (5) defendant actually and subjectively believed a danger existed which required the use of force; and (6) defendant's beliefs were objectively reasonable. When evidence supports a self-defense instruction, a second-degree murder instruction must be given as a mandatory counterpart.

The court held that defense counsel was ineffective for not presenting a claim of self-defense. The evidence showed that prior to the night of the shooting, the victim had acted in a menacing fashion towards defendant and had displayed a gun. In response to this menacing behavior defendant armed himself with a gun. On the night of the shooting, the victim drove defendant to an apartment complex in order to rob two acquaintances of defendant's, including co-defendant. They both got out of the car and defendant saw the victim fumbling in his waist. Defendant feared that the victim might be getting ready to shoot him.

The two men walked through the parking lot when co-defendant, an acquaintance of defendant's who also knew about the victim's threatening behavior, came out of nowhere, knocked the victim to the ground and then shot him. The co-defendant's actions frightened defendant, who also fell to the ground. When defendant got up, he shot the victim several times as he lay on the ground. Co-defendant took the victim's gun and shot him again. Defendant was convicted of first-degree murder.

The court held that the evidence showed defendant believed he was in danger and that the victim threatened defendant with force when he showed defendant his gun

and acted in a menacing manner. On the night of the shooting, defendant saw the victim fumbling in his waistband and knew that the victim intended to commit a robbery. The record thus provided slight evidence warranting a jury instruction on self-defense. And since this defense was consistent with the defense actually presented, counsel's failure to raise self-defense amounted to deficient representation.

The failure to raise this defense was also prejudicial. In making this finding, the court noted that co-defendant was convicted of second degree murder. Even if defendant's belief in self-defense had been unreasonable the jury could have found him guilty of second degree murder.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

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JUDGE

§31-3(c)

People v. Tate, 2016 IL App (1st) 140598 (No. 1-14-0598, 9/14/16)

1. A defendant has an absolute right to a substitution of judge upon the timely filing of a proper written motion. In other words, a motion for automatic substitution must be granted if the motion is made within 10 days after the case is placed on the judge's trial call, names only one judge (except that a person charged with a Class X felony may name two judges), is in writing, and alleges that the trial judge is so prejudiced that defendant cannot receive a fair trial. In addition, the motion must be filed before the trial judge makes any substantive rulings in the case.

A motion for substitution is timely if it is brought within 10 days of the time defendant can be charged with knowledge that a particular judge has been assigned to the case. Whether a substitution motion is timely is to be determined on the facts of each case.

2. Here, defendant could not be charged with knowledge that the case had been assigned to a particular judge where at a preliminary proceeding, the case was assigned for the next appearance to Room 107, where the judge in question customarily presided. The court concluded that defendant was charged with notice of the judge's assignment only when the Chief Judge officially assigned the case. Because the motion to substitute was filed within 10 days of the latter date, it was timely.

3. Under Illinois law, the erroneous denial of a motion for automatic substitution of judge is a "fundamental defect" which voids all subsequent action taken by the judge who should have been substituted. Because the trial court improperly denied the motion

for automatic substitution, the lower court's judgment was reversed and the cause remanded for further proceedings.

JUVENILE

§§33-3, 33-6(d)

People v. Jackson, 2016 IL App (1st) 141448 (No. 1-14-1448, 9/21/16)

Defendant, who was 17 years old at the time of the offense, was tried as an adult, convicted of armed robbery with a firearm, and sentenced to 21 years imprisonment, including a 15-year enhancement for possessing a firearm during the offense.

1. On appeal, defendant argued that he was entitled to a new sentencing hearing in juvenile court due to Public Act 99-258 which amended the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130) to remove armed robbery with a firearm as one of the offenses subject to automatic transfer.

The court rejected defendant's argument. It held that the controlling statutory provision was section 5-120 of the Juvenile Court Act, not section 5-130. At the time of the offense, section 5-130 stated that a defendant charged with a felony must be under 17 years old at the time of the offense to be subject to the juvenile court's jurisdiction. Section 5-130 is more restrictive than section 5-120 and states that a juvenile who is under 17 but over 15 years old is also excluded from juvenile court if he is charged with armed robbery with a firearm.

Public Act 98-61 amended section 5-120 to raise the age of exclusion to 18, but it contains a savings clause stating that it only applies to offenses committed after the effective date of the amendment. Here, defendant was charged with committing a felony when he was 17 years old and before the effective date of Public Act 98-61. He thus did not fall within the juvenile court's jurisdiction.

2. The court also held that defendant was not entitled to be resentenced pursuant to the 730 ILCS 5/5-4.5-105. Section 5-4.5-105 requires a sentencing court to consider specific sentencing factors applicable to juveniles when a defendant is under 18 years old at the time he committed the offense. But this section only applies to offenses committed on or after the effective date of the statute. Here defendant committed the offense prior to the effective date of the statute and thus it does not apply to him.

(Defendant was represented by Assistant Defender Imran Ahmad, Chicago.)

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§§33-6(a), 33-6(d)

People v. Aikens, 2016 IL App (1st) 133578 (Nos. 1-13-3578 & 1-15-1522, 9/12/16)

The proportionate penalties clause of the Illinois Constitution was violated by application of the adult sentencing scheme for attempt murder of a peace officer with a firearm to a 17-year-old who was tried as an adult. The minor was sentenced to the mandatory minimum term totaling 40 years - 20 years for attempted murder of a peace officer plus 20 years for personally discharging a firearm in the course of that offense. In sentencing defendant, the trial court noted that defendant had no prior record and had a difficult upbringing, and that the mandatory minimum sentence "seems to be an unimaginable amount of time . . . for a teenage child." A mitigation specialist testified that defendant had more potential than any client she had evaluated, that defendant had a supportive adopted family, and that the Illinois Institute of Technology had granted defendant early acceptance due to his academic excellence.

1. An "as applied" constitutional challenge requires defendant to show that the statute at issue violates the Constitution as applied to his or her particular case. A challenge under the proportionate penalties clause contends that the penalty in question was not determined according to the seriousness of the offense. A violation may be shown where the penalty imposed is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.

The Illinois Supreme Court has not defined what kind of punishment is cruel, degrading, or wholly disproportionate to the offense, because concepts of elemental decency and fairness evolve as society evolves. Thus, to determine whether a penalty shocks the moral sense of the community, courts must consider objective evidence as well as the community's changing standards of moral decency.

2. Noting that no one was injured in the offense, the court concluded that as applied to defendant the sentencing scheme violated the proportionate penalties clause because defendant had no prior criminal history, was described by the mitigation specialist as full of potential and able to fully rehabilitate as a contributing member of society, and was sentenced to the statutory minimum by the trial court who noted that defendant was young, had no criminal history, and had a "quite troubling" background. The court stressed that recent changes to the Juvenile Court Act, while inapplicable to this case, illustrate a "changing moral compass in our society when it comes to trying and sentencing juveniles as adults."

Defendant's sentence was reversed and the cause remanded for resentencing.

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

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§33-6(a)

People v. Reyes, 2016 IL 119271 (No. 119271, 9/22/16)

Defendant, who was 16 years old at the time of the offense, was tried as an adult and convicted of first degree murder and two counts of attempted murder. The trial court imposed a mandatory minimum sentence of 45 years for first degree murder which included a 25-year mandatory firearm enhancement. The court also sentenced defendant to 26 years for the two attempt murder convictions, both of which included a 20-year mandatory firearm enhancement. All of the sentences were required to run consecutively resulting in a mandatory minimum sentence of 97 years. Defendant was required to serve a minimum of 89 years before he would be eligible for release.

The Illinois Supreme Court held that defendant's sentence was a *de facto* mandatory life sentence that was unconstitutional under **Miller v. Alabama**, 567 U.S. ___, 132 S.Ct. 2455 (2012). A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect as an actual mandatory life sentence. In either situation the defendant will die in prison. **Miller** held that a juvenile may not be sentenced to a mandatory unsurvivable prison term unless the court first considers his youth, immaturity, and potential for rehabilitation.

Here defendant was 16 when he committed the offense and since he must serve 89 years, he will remain in prison until he is 105. Defendant's sentence is therefore a mandatory *de facto* life sentence.

The court vacated defendant's sentence and remanded for a new sentencing hearing under the newly enacted sentencing scheme in 730 ILCS 5/5-4.5-105 which requires the sentencing court to take into account specific factors in mitigation when sentencing a juvenile. Additionally, the court has discretion to not impose the firearm enhancements. Without those enhancements defendant's minimum aggregate sentence would be 32 years, a term that is not a *de facto* life sentence.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

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§33-6(a)

People v. Stafford, 2016 IL App (4th) 140309 (No. 4-14-0309, 9/1/16)

Under **Miller v. Alabama**, 567 U. S. ___, 132 S.Ct. 2455 (2012), life sentences for juveniles are reserved for those rare juvenile offenders whose crimes reflect irreparable corruption. Here, the trial court did not err by imposing a natural life sentence for four counts of first degree murder and one count of felony murder which occurred when defendant was 17 years old. The trial judge stated that the primary reason for imposing a natural life sentence was to keep the community safe, and at the sentencing hearing defendant's father expressed his concern that if defendant was released more people would be hurt. In addition, the record showed that defendant broke

into the home of an acquaintance who had previously shown him kindness and stabbed the acquaintance 45 times because she walked in as he was attempting to steal videotapes.

The court also noted that there had been numerous attempts to assist defendant in dealing with his behavioral issues, that defendant devised a jail escape plan while being held in the present case, and that defendant broke several other jail rules. Although the trial court did not explicitly state that defendant was one of the rare juvenile offenders for whom a life sentence was appropriate, the court found that the trial judge's reasoning conveyed the same conclusion. Therefore, the trial court did not abuse its discretion by imposing a natural life sentence.

(Defendant was represented by Assistant Defender James Williams, Springfield.)

§33-6(b)

In re Jarquan B., 2016 IL App (1st) 161180 (No. 1-16-1180, 9/30/16)

As of January 1, 2016, a juvenile may not be sentenced to the Department of Juvenile Justice (DJJ) for a misdemeanor offense. 705 ILCS 405/5-710(1)(b). But a juvenile who violates probation may receive any sentence available at the time of the initial sentence. 705 ILCS 405/5-720(4).

Defendant, a juvenile, pled guilty to criminal trespass to a motor vehicle, a Class A misdemeanor, on February 26, 2015, and was sentenced to court supervision. On October 13, 2015, the court found defendant in violation of his supervision and sentenced him to probation on November 5, 2015. Defendant violated his probation and on April 26, 2016, the court sentenced defendant to the DJJ.

On appeal defendant argued that under section 710(1)(b), the juvenile court had no authority to sentence him to the DJJ. The Appellate Court disagreed. It held that section 720(4) was the controlling statute and thus the juvenile court could impose any sentence available at the time defendant initially pled guilty, which would have included commitment to the DJJ.

The dissent believed the amended version of section 710(1)(b) should control and thus defendant could not be sentenced to the DJJ.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

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§33-6(d)

People v. Jackson, 2016 IL App (1st) 143025 (No. 1-14-3025, 9/30/16)

Defendant, who was 16 at the time of the offense, was convicted of first degree murder in adult court. Because he personally discharged a firearm that proximately caused death, defendant was subject to a 25-years-to-life firearm enhancement, making his sentencing range 45 years to life. Defendant was ultimately sentenced to 50 years imprisonment.

The court found that defendant's sentence did not violate the Eighth Amendment's prohibition on cruel and unusual punishments. The court noted that the Illinois Supreme Court held that juveniles may be sentenced to life imprisonment so long as the sentence is discretionary. **People v. Davis**, 2014 IL 115595. Here defendant was subject to minimum sentence of 45 years and received a discretionary sentence of 50 years. There was thus no Eighth Amendment violation.

(Defendant was represented by Assistant Defenders Sharon Nissim, Chicago, and Yasemin Eken, Elgin.)

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ROBBERY

§43-4

In re Thomas T., 2016 IL App (1st) 161501 (No. 1-16-1501, 9/23/16)

The vehicular invasion statute requires the State to prove that a defendant "by force" entered or reached into the interior of a motor vehicle while it was occupied by another person with the intent to commit a theft or felony. 720 ILCS 5/18-6(a). The term "force" is not defined in the statute. But Black's Law Dictionary defines force as "power, violence, compulsion, or constraint exerted upon or against a person or thing."

Here a taxi driver was sitting in his cab at a stop light. Defendant opened the front passenger door of the cab and took a pouch of money and taxi receipts that was on the front passenger seat. Defendant closed the door and fled with the pouch.

The court held that the evidence did not show that defendant entered the taxi and took the pouch by force. Although defendant did exert some authority over the taxi, that authority was exercised without a showing of strength, power, or violence. The door was unlocked and defendant did not physically damage the taxi. In opening the unlocked door, defendant did not exercise constraint or compulsion over the driver. The State thus failed to meet its burden.

Defendant's adjudication for vehicular invasion was reversed.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

SENTENCING

§45-1(b)(2)

People v. Aikens, 2016 IL App (1st) 133578 (Nos. 1-13-3578 & 1-15-1522, 9/12/16)

The proportionate penalties clause of the Illinois Constitution was violated by application of the adult sentencing scheme for attempt murder of a peace officer with a firearm to a 17-year-old who was tried as an adult. The minor was sentenced to the mandatory minimum term totaling 40 years - 20 years for attempted murder of a peace officer plus 20 years for personally discharging a firearm in the course of that offense. In sentencing defendant, the trial court noted that defendant had no prior record and had a difficult upbringing, and that the mandatory minimum sentence "seems to be an unimaginable amount of time . . . for a teenage child." A mitigation specialist testified that defendant had more potential than any client she had evaluated, that defendant had a supportive adopted family, and that the Illinois Institute of Technology had granted defendant early acceptance due to his academic excellence.

1. An "as applied" constitutional challenge requires defendant to show that the statute at issue violates the Constitution as applied to his or her particular case. A challenge under the proportionate penalties clause contends that the penalty in question was not determined according to the seriousness of the offense. A violation may be shown where the penalty imposed is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.

The Illinois Supreme Court has not defined what kind of punishment is cruel, degrading, or wholly disproportionate to the offense, because concepts of elemental decency and fairness evolve as society evolves. Thus, to determine whether a penalty shocks the moral sense of the community, courts must consider objective evidence as well as the community's changing standards of moral decency.

2. Noting that no one was injured in the offense, the court concluded that as applied to defendant the sentencing scheme violated the proportionate penalties clause because defendant had no prior criminal history, was described by the mitigation specialist as full of potential and able to fully rehabilitate as a contributing member of society, and was sentenced to the statutory minimum by the trial court who noted that defendant was young, had no criminal history, and had a "quite troubling" background. The court stressed that recent changes to the Juvenile Court Act, while inapplicable to this case, illustrate a "changing moral compass in our society when it comes to trying and sentencing juveniles as adults."

Defendant's sentence was reversed and the cause remanded for resentencing.

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

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§45-1(b)(2)

People v. Jackson, 2016 IL App (1st) 143025 (No. 1-14-3025, 9/30/16)

Defendant, who was 16 at the time of the offense, was convicted of first degree murder in adult court. Because he personally discharged a firearm that proximately caused death, defendant was subject to a 25-years-to-life firearm enhancement, making his sentencing range 45 years to life. Defendant was ultimately sentenced to 50 years imprisonment.

The court found that defendant's sentence did not violate the Eighth Amendment's prohibition on cruel and unusual punishments. The court noted that the Illinois Supreme Court held that juveniles may be sentenced to life imprisonment so long as the sentence is discretionary. **People v. Davis**, 2014 IL 115595. Here defendant was subject to minimum sentence of 45 years and received a discretionary sentence of 50 years. There was thus no Eighth Amendment violation.

(Defendant was represented by Assistant Defenders Sharon Nissim, Chicago, and Yasemin Eken, Elgin.)

§§45-1(b)(2), 45-2

People v. Reyes, 2016 IL 119271 (No. 119271, 9/22/16)

Defendant, who was 16 years old at the time of the offense, was tried as an adult and convicted of first degree murder and two counts of attempted murder. The trial court imposed a mandatory minimum sentence of 45 years for first degree murder which included a 25-year mandatory firearm enhancement. The court also sentenced defendant to 26 years for the two attempt murder convictions, both of which included a 20-year mandatory firearm enhancement. All of the sentences were required to run consecutively resulting in a mandatory minimum sentence of 97 years. Defendant was required to serve a minimum of 89 years before he would be eligible for release.

The Illinois Supreme Court held that defendant's sentence was a *de facto* mandatory life sentence that was unconstitutional under **Miller v. Alabama**, 567 U.S. ___, 132 S.Ct. 2455 (2012). A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect as an actual mandatory life sentence. In either situation the defendant will die in prison. **Miller** held that a juvenile may not be sentenced to a mandatory unsurvivable prison term unless the court first considers his youth, immaturity, and potential for rehabilitation.

Here defendant was 16 when he committed the offense and since he must serve 89 years, he will remain in prison until he is 105. Defendant's sentence is therefore a mandatory *de facto* life sentence.

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The court vacated defendant's sentence and remanded for a new sentencing hearing under the newly enacted sentencing scheme in 730 ILCS 5/5-4.5-105 which requires the sentencing court to take into account specific factors in mitigation when sentencing a juvenile. Additionally, the court has discretion to not impose the firearm enhancements. Without those enhancements defendant's minimum aggregate sentence would be 32 years, a term that is not a *de facto* life sentence.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

§45-3(a)

People v. Goods, 2016 IL App (1st) 140511 (No. 1-14-0511, 9/12/16)

The federal constitution guarantees a public trial as a restraint on the possible abuse of judicial power. But the presumption of openness may be overcome where closure is essential to preserve higher values.

At his sentencing hearing, defendant asked to present certain mitigating evidence regarding his cooperation with the State *in camera* since he feared for his safety if he were to be labeled a "snitch." The trial court denied the request, stating that it could not hear such evidence *in camera* unless there was a statute permitting it.

In a case of first impression in Illinois. the Appellate Court held that the trial court erred in not allowing defendant to present his mitigation *in camera*. The court held that a defendant should be allowed to present mitigation *in camera* when he shows good cause for doing so. Here defendant's concern for his safety showed good cause. The trial court was essentially asking defendant to choose between his safety and his ability to present mitigation. Defendant was thus denied a fair hearing.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

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§45-7(b)

People v. Carter, 2016 IL App (3d) 140196 (No. 3-14-0196, mod. op. 9/2/16)

In **People v. Castleberry**, 2015 IL 116916, the Supreme Court abolished the void sentence rule, which allowed the Appellate Court to increase illegally low sentences to conform with minimum statutory requirements. The court concluded that after **Castleberry**, the Appellate Court may no longer remand a cause to the trial court for imposition of fines that were improperly imposed by the circuit clerk. The court concluded

that it should merely vacate improperly imposed fines rather than remanding for the trial court to impose the fines.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

§45-7(b)

People v. McCray, 2016 IL App (3d) 140554 (No. 3-14-0554, 9/27/16)

After defendant's bench trial, the trial court imposed a six-year sentence for unlawful possession of heroin and unlawful possession of cannabis with intent to deliver. The defendant filed a notice of appeal six days later.

Nine days after the notice of appeal was filed, the trial court filed a written judgment which added the requirement that defendant pay a drug assessment in the amount of $2000. The Appellate Court vacated the $2000 assessment as an improper modification of the sentence.

1. Once a notice of appeal is filed, the Appellate Court's jurisdiction attaches. At this point, the trial court may not modify the order or judgement or take any action which interferes with appellate review.

The entry of a written judgement order is a ministerial act that merely evidences the oral pronouncement of sentence, which is the judicial act comprising the judgment of the court. Thus, the trial court has jurisdiction to complete the ministerial act of filing a written judgment order even after notice of appeal has been filed.

2. However, the trial court lacked jurisdiction to modify the sentence after the notice of appeal had been filed. Because the $2000 drug assessment was not imposed during the trial court's oral pronouncement, the court could not assess that amount in the written judgement order. The court acknowledged that during the oral pronouncement the trial court ordered that defendant pay costs, but found that the drug assessment is a "fine" rather than a "cost."

(Defendant was represented by Assistant Defender Editha Rosario-Moore, Ottawa.)

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§45-7(b)

People v. Wade, 2016 IL App (3d) 150417 (No. 3-15-0417, 9/14/16)

Acknowledging a conflict with other appellate districts, the court concluded that under **People v. Castleberry**, 2015 IL 116916, the Appellate Court lacks jurisdiction to remand the cause to allow the trial court to impose mandatory fines that were

erroneously ordered by the circuit clerk. Instead, a reviewing court must vacate fines that were imposed by the circuit clerk without ordering a remand to the trial court. If the State wishes to pursue the mandatory fines, its remedy is to file a petition for writ of mandamus with the Supreme Court.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

§45-13

People v. Cashaw, 2016 IL App (4th) 140759 (No. 4-14-0759, 9/30/16)

Under **Teague v. Lane**, 489 U.S. 288 (1989), new rules of criminal procedure generally do not apply retroactively to final convictions and hence cannot be used in a postconviction attack on a conviction that became final prior to the announcement of the new rule. Illinois has adopted the **Teague** rule to govern retroactivity in State collateral proceedings.

Teague's purpose is to protect the State's interest in final judgments. **Teague** thus only applies when a defendant seeks to overturn his conviction by retroactively applying a new rule that is favorable to him. Under **Teague**, the State, but not the defendant, may object to the application of a new rule to a case on collateral review.

The court held that **People v. Castleberry**, 2015 IL 116916, applied retroactively to defendant's postconviction case for two reasons. First, **Castleberry** did not announce a new rule. Instead, it merely abolished the void sentence rule and thereby reinstated the rule in effect before the void sentence rule was created. Second, in this case defendant sought to prevent the application of a new rule to a collateral proceedings not to preserve the finality of a judgment, but to disturb its finality. A defendant cannot use **Teague** to argue that a new rule should not apply when the defendant is seeking to overturn a judgment.

The court thus concluded that although defendant's fine would have been considered void prior to **Castleberry**, once the rule in **Castleberry** applied to his case, the fine was no longer void and could not be challenged in a successive collateral proceeding.

(Defendant was represented by Assistant Defender Erica Nichols-Cook, Springfield.)

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§45-13

People v. Stafford, 2016 IL App (4th) 140309 (No. 4-14-0309, 9/1/16)

Noting a conflict in Appellate Court authority, the Fourth District Appellate Court held that **People v. Castleberry**, 2015 IL 116916did not create a new rule and therefore applies retroactively. Because **Castleberry** abolished the void sentence rule, the previous rule is reinstated. Thus, a sentence can be challenged as void only if the court lacked personal or subject matter jurisdiction.

(Defendant was represented by Assistant Defender James Williams, Springfield.)

§45-16(a)

People v. Montalvo, 2016 IL App (2d) 140905 (No. 2-14-0905, 9/23/16)

Under 730 ILCS 5/3-6-3(a)(4), a pretrial detainee may obtain sentence credit for participating in a "full-time" behavior modification program provided by the county jail. Under 20 Ill. Adm. Code 107.520(d)(4), a "full-time" program requires enrollment for a minimum of 15 hours. Credit for successfully completing such a program is calculated at the rate of one-half day of credit for each day of participation.

Here, defendant enrolled in an anger management program which required him to attend 12 weekly two-hour sessions over a three-month period. The court found that the trial judge erred by not granting sentencing credit.

1. First, the trial court erred by failing to determine at sentencing whether defendant was eligible for sentence credit and by deferring the credit question to DOC. Section 3-6-3 requires that the trial court determine the credit and include that calculation in the sentencing order.

2. In addition, because the 24 hours of required participation exceeded the 15-hour requirement of 20 Ill. Adm. Code 107.520(d)(4), the anger management program was "full-time." Because defendant attended two-hour sessions on 12 separate days, and the credit rate is one-half day for each day of participation, defendant was entitled to six days credit.

3. The court rejected the argument that defendant was entitled to 39 days of credit because the program spanned 78 calendar days from beginning to end, although defendant attended sessions only on 12 of those days. The court concluded that credit is to be given only for days on which defendant actually participates in the program.

(Defendant was represented by Deputy Defender Tom Lilien, Elgin.)

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§45-16(b)

People v. Nesbit, 2016 IL App (3d) 140591 (Nos. 3-14-0591 & 3-14-0695, 9/8/16)

A defendant is entitled to credit against his sentence for each day he spends in pretrial custody. But a defendant who is out on bond on one charge and is subsequently arrested and returned to custody on another charge is not entitled to credit on the first charge until his bond is withdrawn or revoked. Once a defendant withdraws or surrenders his bond, he is considered in custody on both charges and earns credit against each charge.

A month after he was charged in the present case, defendant posted bond and was released from custody. The Department of Corrections immediately took defendant into custody for an earlier conviction. When defendant appeared in court on the present charge, his attorney informed the court that defendant was on bond in this case and in DOC custody on another case.

Following his conviction, defendant filed a post-conviction petition alleging that his counsel had provided ineffective assistance of counsel for failing to surrender his bond. In an affidavit attached to the petition, defendant stated that his counsel never informed him that he could surrender his bond and receive sentencing credit. He further stated that if his counsel had so informed him, he would have surrendered his bond.

The Appellate Court held that defendant's post-conviction claim made a substantial showing of ineffective assistance warranting a third-stage evidentiary hearing. The failure of counsel to notify defendant of his option to surrender bond and receive credit was objectively unreasonable and created prejudice by depriving defendant of sentencing credit.

The case was remanded for a third-stage evidentiary hearing.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

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THEFT

§49-1

People v. Tepper, 2016 IL App (2d) 160076 (No. 2-16-0076, 9/23/16)

720 ILCS 5/33E-17 provides that the offense of unlawful participation occurs where without the informed consent of the employer and with intent to defraud, a local government or school district employee "participates, shares in, or receiv[es] directly or indirectly" any money, property or benefit through a contract between the employer and a vendor. As a matter of first impression, the Appellate Court concluded that the offense does not require an affirmative act of deceit or that the employer suffered a pecuniary loss. Thus, a Forest Preserve IT manager who failed to disclose that he was

an employee of a company with whom the Forest Preserve contracted for computer services, and that he received commissions from the contract, committed the offense of unlawful participation.

However, the court also concluded that defendant was improperly convicted of 29 counts of unlawful participation because he received monthly commission payments for 29 months. Holding that the statute was ambiguous, the court concluded that the "unit of prosecution" was the employer's act of making a contract without being informed that its employee was also an employee of the vendor. Thus, only one conviction could stand whether the defendant received payments from the vendor in a lump sum or over time.

TRIAL PROCEDURES

§52-1

People v. Goods, 2016 IL App (1st) 140511 (No. 1-14-0511, 9/12/16)

The federal constitution guarantees a public trial as a restraint on the possible abuse of judicial power. But the presumption of openness may be overcome where closure is essential to preserve higher values.

At his sentencing hearing, defendant asked to present certain mitigating evidence regarding his cooperation with the State *in camera* since he feared for his safety if he were to be labeled a "snitch." The trial court denied the request, stating that it could not hear such evidence *in camera* unless there was a statute permitting it.

In a case of first impression in Illinois. the Appellate Court held that the trial court erred in not allowing defendant to present his mitigation *in camera*. The court held that a defendant should be allowed to present mitigation *in camera* when he shows good cause for doing so. Here defendant's concern for his safety showed good cause. The trial court was essentially asking defendant to choose between his safety and his ability to present mitigation. Defendant was thus denied a fair hearing.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

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WAIVER

§§56-1(a), 56-1(b)(3)(b)
People v. McCoy, 2016 IL App (1st) 130988 (No. 1-13-0988, 9/15/16)

At defendant's murder trial, the prosecution erred by cross-examining defendant with impeachment questions which it had neither the intention nor the ability to prove. The court concluded that the error was preserved despite the fact that in the post-trial motion, defense counsel erroneously stated that the State's assertion occurred during closing argument rather than during cross-examination. A post-trial motion must make a sufficiently specific allegation to give the trial judge an adequate opportunity to correct the error. This standard was satisfied where at trial the only reference to defendant's alleged threats occurred during cross-examination.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

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WITNESSES

§57-6(b)(1)
People v. Munoz-Salgado, 2016 IL App (2d) 140325 (No. 2-14-0325, 9/8/16)

The right of confrontation only applies where the primary purpose of an out-of-court statement is testimonial. Outside the context of police interrogation, the declarant's intent determines whether a statement is testimonial. To be testimonial, a reasonable person in declarant's position would anticipate her statement being used against the accused in a criminal prosecution.

An emergency room nurse conducted a sexual assault examination on the victim. During the exam, the nurse asked the victim several questions about the assault. The victim told the nurse that defendant threw her face down on a bed, held her down, put on a condom, and forcefully had sex with her. The State introduced the victim's out-of-court statements at defendant's trial.

The court held that the victim's statements did not violate the confrontation clause. The nurse conducted an examination with the two-fold purpose of collecting evidence for possible use in a criminal prosecution and ensuring that the victim received medical treatment. The medical exam was necessary and appropriate, and required the nurse to obtain a history from the victim of the events leading to her seeking treatment. Under these circumstances, the victim's statement was not primarily for the purpose of gathering evidence.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

§57-6(b)(2)

People v. Hood, 2016 IL 118581 (No. 118581, 9/22/16)

1. A criminal defendant has a constitutional right to physically face persons who testify against him and to conduct cross-examination. Under **Crawford v. Washington**, 541 U.S. 36 (2004), where the State seeks to admit "testimonial" hearsay, it must establish both that the declarant is unavailable to testify at trial and that defendant had a prior opportunity for cross-examination. Under **Crawford**, depositions are testimonial hearsay.

2. Here, the State sought to admit the deposition of the complainant. The court found that the State demonstrated that the complainant was unavailable to testify at trial and that defendant had a prior opportunity for cross-examination. The complainant's attending physician testified that at the time of trial, the complainant was living in a nursing home and was unable to care for himself. In addition, the testimony established that the complainant was suffering from severe dementia, had no awareness of his environment, and was unable to communicate in any meaningful way.

Furthermore, defendant had the opportunity for cross-examination although he was not present at the deposition. The court noted that defendant was not barred or prevented from attending the deposition; in fact, the trial court's order for the deposition directed the Cook County Sheriff to transport defendant to the deposition "over the objection of the defendant." This paragraph was then crossed out by hand. At trial, defense counsel confirmed that he had waived defendant's presence at the deposition. Under these circumstances, defendant was fully aware that the deposition had been ordered and that he had the right to attend.

In addition, two assistant public defenders appeared on defendant's behalf at the deposition and conducted cross-examined.

Because both the unavailability of the complainant and a prior opportunity for cross-examination were shown, admission of the deposition did not violate **Crawford**.

3. Similarly, admission of the deposition did not violate defendant's due process right to be present. The due process right to be present is a "lesser right" that is violated only if the defendant's absence results in an unfair proceeding or the loss of an underlying substantial right. The court found that because defendant's confrontation rights were not violated, there could be no violation of the secondary due process right to be present.

4. Supreme Court Rule 414(e) provides that defendant and defense counsel have the right to confront and cross-examine any witness whose deposition is taken, but that defendant and defense counsel "may waive such right in writing." The court rejected the argument that the trial court violated Rule 414(e) by admitting a deposition that had been obtained without defendant's written waiver. The court found that the written waiver requirement was not constitutionally mandated, but was merely a procedural rule to ensure the defendant was given notice of the deposition and an opportunity to

appear. Where it was clear that defendant knew of the deposition and that he could attend if he wanted, the absence of a written waiver did not cause prejudice.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

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§§57-6(b)(4)(a), 57-6(b)(4)(f)(1), 57-6(b)(4)(f)(4), 57-6(b)(4)(i)

People v. McCoy, 2016 IL App (1st) 130988 (No. 1-13-0988, 9/15/16)

1. It is improper for the State to question a witness for purposes of impeachment unless it is prepared to offer proof of the impeaching information. In other words, the State must possess a good-faith basis for cross-examination questions as well as the intent and ability to complete the impeachment.

At defendant's murder trial, the prosecution erred in cross-examining defendant where it asked whether defendant had threatened to kill the decedent's family if decedent said anything about defendant having been at the scene. There was nothing in the record to suggest that the State had the intent or ability to complete the impeachment by showing that defendant had made such a threat. Although the decedent made several statements to first responders before he died, there was no evidence to suggest that he told anyone that defendant threatened to kill his family. "In short, there was simply no evidence whatsoever to support the State's question."

The court concluded that the error was not harmless. Because there were no witnesses to the actual shooting and defendant offered an explanation for his presence in the decedent's car, the jury's verdict rested primarily on whether it found defendant's testimony to be credible. In addition, when defendant denied making the threat the State's Attorney implied that defendant was lying. The court also noted that the nature of the State's accusation "was so outrageous that it colored the entire trial."

2. A prior conviction is admissible to attack a witness's credibility where the prior crime: (1) was punishable by death or imprisonment of more than a year or involved dishonesty or a false statement, (2) was less than 10 years old or the witness was released from confinement within the last 10 years, and (3) has sufficient probative value to outweigh any danger of unfair prejudice. The trial court should consider, among other things, the nature of the prior conviction, the length of the witness's criminal record, the witness's age and circumstances, and the extent to which it is more important for the jury to hear defendant's story than to learn of a prior conviction. Although a prior conviction need not be excluded merely because it was for a similar crime to that for which the defendant is on trial, the trial court should be cautious in admitting such convictions.

Here, the trial court abused its discretion by admitting a prior attempt murder conviction at defendant's trial for murder. Not only was the prior conviction nearly identical to the crime charged, but in closing argument the prosecutor repeatedly encouraged the jury to focus on the prior conviction rather than the charge. Because the prejudicial effect of the prior conviction outweighed its probative value, admission of the evidence constituted error.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

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